No. 95/1112/Y2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2A 2LL

Friday 24 November 1995

B e f o r e:

LORD JUSTICE BELDAM

MR JUSTICE SCOTT BAKER

and

MR JUSTICE STUART WHITE

R E G I N A

- v -

SATPAL RAM

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(Official Shorthand Writers to the Court)

MR IAN MACDONALD and MR LALITH DE KAUWE appeared on behalf of **THE APPELLANT**

MR ANTHONY BARKER QC appeared on behalf of **THE CROWN**

J U D G M E N T
(As Approved by the Court)

Friday 24 November 1995

LORD JUSTICE BELDAM: On 10 June 1987, in the Crown Court at Birmingham, the appellant was convicted of the murder of Clarke Edward Pearne. He was sentenced to imprisonment for life. His application for leave to appeal against his conviction was initially refused but was renewed to the full court on 6 March 1989. On that occasion he was represented by Mr Patrick O'Connor who argued that there had been a material irregularity in the conduct of the trial when Leading Counsel for the defence, Mr Douglas Draycott QC, had failed to ask for the services of an interpreter to enable a witness, Mr Mozomil, to be fully cross-examined to establish facts in support of the defence of provocation. Mr O'Connor invited the court to say that Mr Draycott had been guilty of such a dereliction of duty in conducting the defence that the conviction of the appellant was unsafe and unsatisfactory. The court, after careful consideration of the circumstances, dismissed his application.

Now, six-and-a-half years later, the conviction of the appellant has been referred to the court for review by the Secretary of State acting under Sec. 17 of the Criminal Appeal Act 1968. It is again argued that the appellant's conviction is unsafe and unsatisfactory. Again Mr Douglas Draycott QC is blamed. It is said that Mr Draycott's advice that the defence to be run at trial should be provocation was contrary to the appellant's instructions that he had acted in self-defence; that the appellant was deprived of the only defence likely to succeed because of a grave misunderstanding by Mr Draycott of the cause of some of the multiple injuries sustained by the deceased. Further, Mr Draycott had unwarrantably formed the view

that the appellant would be likely to be a vulnerable witness if he testified on his own behalf and had accordingly advised him not to give evidence, thus depriving him of the opportunity to put his explanation of self-defence before the jury.

We must begin with an outline of the facts.

Clarke Pearce, the deceased, sustained a fatal stab wound at about 2.30 a.m. on Sunday 16 November 1986 in the Sky Blue Indian Restaurant in Lozells Road, Birmingham. The deceased, with his girlfriend and two other white couples, made up a party of six occupying a table against the left-hand wall just inside the front door of the restaurant. They had spent the Saturday evening drinking and according to another customer were quite rowdy.

The appellant, who is Asian, had also been drinking. He was sharing a table close by with his white girlfriend and a fellow Asian. At about 2.30 a.m. one of the staff in the restaurant started to play background Indian music. Almost at once the deceased asked loudly for it to be turned off, describing it as "black crap". The appellant responded by shouting: "Turn it up. It's chart music."

The deceased got up and, according to one customer, lurched towards the table where the appellant was sitting. The appellant's friend, whose name was Shinji, pushed him back but he lurched forward again and at this the appellant stood up. The evidence of what happened next was confused. Some witnesses saw the deceased with a glass in his hand with which he struck the appellant on the left cheek. The appellant received a cut requiring three stitches. Mr Bishop, a customer who was watching, saw Shinji push the deceased away again and he went back a step or two. And the next thing he saw was a knife with about three inches of silver blade showing between the

fingers of the appellant. He said the blade was protruding between the thumb and forefinger of his right hand. One of the girls in the deceased's party got up and went to pull the deceased away.

According to another customer, Mark Trace, after the altercation about the music the two Asians and the six white people started to shout at each other. The deceased and the two Asians got up at the same time and the deceased shouted towards the Asians: "You don't talk to me like that". The two parties continued to abuse each other, the Asians shouting back words like "Who do you think you are, you white bastard". After about a minute Mr Trace saw a small wine glass thrown from the direction of the table where the two Asians were sitting hit the deceased on the head. The glass shattered. The deceased was being restrained by one of his friends. He too saw the appellant bring out a knife with the blade pointed upwards, holding it by the handle in his clenched fist. The deceased went towards the Asian with the knife and they both went for each other. When he looked back, the deceased was staggering towards the door, helped by one of his party. Blood was streaming from the deceased's forehead. The deceased then collapsed near the entrance of the restaurant and lay on his side in a pool of blood. The two Asians walked towards the door shouting abuse; he heard the appellant say "I hope I've killed him".

According to the appellant's girlfriend, Miss Evelyn Schneider, after the deceased's offensive comment about the music, the appellant jumped up and in doing so turned over the table, food and glasses going everywhere. Then the deceased lunged forward, pushing a glass into the appellant's face and the next thing the two men were fighting. She then noticed the appellant holding a knife which she

later described in terms only consistent with its being a flick knife. It had a blade 5 inches long and was very slim, coming to a point, and sharp on both sides. She shouted "Give me the knife". She eventually took the knife from the appellant and pushed him into the toilet. She wiped the blood off his face and put the knife either on the floor or on the towel dispenser. She and the appellant then left the restaurant and saw the deceased lying near the door. Once outside the restaurant, they started to run. They took a back street route to her home and from there the appellant went to have the wound on his cheek sutured with three stitches at the Casualty Department of the Sandwell General Hospital in West Bromwich. He was seen by Doctor Smith, a senior house officer, and gave a false name. Doctor Smith described him as extremely inebriated, his speech being slurred and he was staggering. He had a 1½ cm. ragged laceration on the left cheek which was about 1 cm. deep. It was consistent with being cut by glass, and needed sutures but the appellant refused to keep still and became very abusive, using foul language. He eventually inserted three sutures into the wound about an hour and a half later. The appellant also had a small cut to the left forearm but this required no treatment and was not mentioned by Doctor Smith.

In the meantime, an ambulance had been called to take the deceased to the Casualty Department of Birmingham General Hospital. He was seen by Doctor McGivern. He was shouting and thrashing about on the trolley, and was uncooperative. He was undoubtedly clinically shocked and had suffered an irregular and deep cut in his left lower back which was bleeding profusely. His condition deteriorated and in spite of attempts to resuscitate him he died.

A postmortem examination was carried out later that morning.

The pathologist, Doctor Norman Gower, noted a number of wounds, including two stab wounds to the back, one of which was fatal. The fatal wound was in the back of the left side of the chest. The track of the wound was horizontal and the weapon used had traversed the left pleural cavity to enter the upper part of the lower lobe of the left lung through a puncture 15 mm. long. It penetrated the lung to a depth of 50 mm. but did not quite transfix it. There was a considerable collapse of the lung. The other stab wound to the back was a complex double incised wound, 70 mm. posterior to the posterior axillary line. It formed an asymmetrical "T" shape. It traversed the lower chest cavity to enter the abdomen through a ragged cut in the left leaf of the diaphragm. Although there was extensive bleeding into the abdominal cavity, no organ was injured by this incision.

There were three jagged cuts above the left eye which did not penetrate beyond superficial tissue and a cut on the left side of the neck below the ear. The deceased had died from haemorrhage as a result of a penetrating wound to the chest. The shape of the stab wounds suggested that they had been inflicted by a sharp bladed weapon not less than 90 mm. (3½ ins.) long.

After the appellant had been treated for the cut on his left cheek, he was not to be found at his usual address and efforts to trace him were unsuccessful. A week later, on the evening of 24 November, he went to the police station at Steelhouse Lane with his solicitor, Mr Morgan. He was interviewed that evening and gave this account of the events of 16 November:

> "We went into the Sky Blue Restaurant for a meal, me, Navinder Singh and Evelyn. We sat down and ordered our meal and as we ordered there was people sitting to the left who were racially

being abusive language. We took no notice of them yet, then the music came on and I asked for the music to be turned up. When the gaffer was gonna turn it up, the guy over there sitting said: 'We don't want no Paki music.' I told him I wasn't talking to him and next thing I know he got up and picked up a brandy glass and broke it on the table. By this time everybody had got up. Then he rushed me and I was against the wall. As he came running at me I went to my back pocket and pulled out a knife which I use for work. I meant to scare him with the knife. By now he shoved the glass in my face and as he lunged for me the knife went in him. I was gushing with blood. I was confused. The table was on the floor. Everything was on the floor. Navinder was talking to the people, trying to stop it ... By now Evelyn had pulled me into the toilets and took the knife off me and she folded the knife and put it on the towel machine. Cos I was bleeding so much I wanted to go to the hospital. Then, as we went out, the guy was jumping up and down saying 'Come on, come on', and the lady was holding him to stop it. Then the geezer walked to the door and fell. Then we left the restaurant and we went to Evelyn's to try to wash the blood off ..."

He later described the knife as a penknife with a blade about 2½-3 inches long.

Asked how many times he had stabbed the deceased, he replied:

"When it happened, it happened so quick. I was in a state of confusion. I can't explain the other stab wounds. But could it be possible he lunged at me from the side his injuries were sustained?"

He later added that he had not attacked the deceased. The deceased had attacked him. He did not use a glass. The penknife was just a normal folding one. He denied he had started the trouble.

Mr Langford, the appellant's solicitor, instructed Mr Douglas Draycott QC and Mr Stephen Linehan for the defence. About a week

before the trial on 1 June 1987 Mr Draycott and Mr Langford attended a conference with the appellant at HM Prison Shrewsbury. After this conference Mr Langford dictated a note recording that it had been decided that:

> "... the defence would be one of provocation based upon the number of injuries found on the deceased making it difficult to argue that the defendant was merely defending himself."

At the trial, Mr Draycott conducted the defence in accordance with the advice he had given and by cross-examination of the witnesses sought to establish that the Crown had failed to prove that the appellant had not been provoked into striking the deceased with the knife. Mr Draycott and junior counsel advised the appellant that it would not be in his interests to give evidence for he would be vulnerable in cross-examination and by way of explanation of the two stab wounds in the back could add little to his statement in interview that it had all happened so quickly that he was in a state of confusion.

The appellant accepted the advice that his defence should be conducted as Mr Draycott had advised and that he should not give evidence on his own behalf.

It is conceded that the judge's summing-up was fair and accurate. At the outset he advised the jury to test the evidence of the witnesses who might be said to be partial to the group of people to which they belonged by looking to see if they could find genuinely independent evidence. He warned them to use special caution in assessing Miss Schneider's evidence whichever way it tended to point. He told them that although Mr Draycott for the defence had relied solely on the special defence of provocation, it was his clear duty

to draw their attention to the appellant's explanation to the police about the stabbing so that they had an opportunity to consider whether the prosecution had made them sure that the stabbing was deliberate and not accidental and whether the prosecution had made them sure that the appellant was not acting in lawful self-defence. He told the jury accurately what the law regarded as lawful self-defence and that if the appellant did no more than he thought was instinctively necessary the jury should regard that as very strong evidence that the amount of force used was in fact reasonable and necessary. After reminding the jury that Mr Draycott had said that the only realistic approach was that the defendant had been provoked, the judge said:

> "It is still a matter for you but you may think that in those circumstances for you to reach any different conclusion would be fanciful to a degree. Nonetheless I have a duty as the trial judge to draw it to your attention and for what it is worth I have done so."

It is not suggested that in that passage the judge misdirected the jury. In dealing with the evidence of the two deep stab wounds the judge, misled by a diagram produced by Doctor Gower, made a significant mistake but one which could only have assisted the appellant. He described the principal injuries as:

> "One to the front, one to the back."

In fact, each of the wounds entered the deceased's back as is clearly described in the report of postmortem examination and shown in photograph 9.

After the appellant's conviction for murder, Mr Patrick

O'Connor was asked to advise whether there were any arguable grounds of appeal against conviction. In an Advice of 12 May 1988, Mr O'Connor was clearly concerned at the treatment of the evidence of Mr Ahmed and Mr Mozomil which he considered favourable to the appellant. He thought the evidence was of great importance to any plea of provocation (or even of accident or self defence). He rightly drew attention to the fact that there were many witnesses to the incident giving different versions of events. He then expressed his concern about the decision not to advance the defences of self-defence or accident, saying that in his opinion:

> "It would be a material irregularity for a defendant to be deprived of an arguable defence by an unjustifiable decision made by his legal representatives."

Accordingly he asked the Registrar to write to Mr Draycott to enquire as to the reasons why he did not advance those defences. He added that he had a typed copy of a brief statement, which he assumed to be a proof of evidence from Mr Ram which effectively put forward self-defence as well as provocation.

On 25 June 1988, almost exactly a year after the appellant's conviction, Mr Draycott gave the reasons for his advice to the appellant in June 1987. He said:

> "1. The facts established at the trial (and which were apparent from the witness statements) established:
>
> (a) The deceased and/or members of his party had made remarks which were racially insulting to the Pakistani community of which Ram was a member;
>
> (b) The deceased had got up from his table,

picked up a wine glass and approached Ram with the intention of attacking him;

(c) The deceased did attack Ram and cut his arm and face with a wine glass;

(d) Ram's injuries, a 1⅝ cm. ragged laceration on left side of face and ¼ in. x ⅜ in. (approx.) cut 2½ ins. above radial aspect of left wrist and this latter probably a defensive injury.

2. Ram reacted to this approach or attack by producing a knife with which he stabbed the deceased who sustained numerous wounds only two of which penetrated deeply. It is necessary to catalogue them because they have a bearing on what was and what was not a viable defence."

Mr Draycott then described the two wounds which penetrated deeply to the back of the deceased and said:

"(b) There were other wounds caused by the knife including three above the left eye and one on the left side of the neck."

He referred to the appellant's account in interview and said that he had been supplied with a long and carefully taken proof of evidence and comments on the prosecution witnesses, he then said:

"Ram's instructions read: 'I accept that I stabbed him once and that was when he dived on me. I can't say where the knife went into his body. I can't explain how all the other injuries he got were caused.' My instructions were that Ram produced a knife to defend himself. A combination of accident and/or self-defence was plainly contemplated.

I saw the accused together with my instructing solicitors at Shrewsbury Prison for 40 mins. on 1 June 1987."

Later Mr Draycott said:

> "I had to consider the number and nature of the injuries and what the evidence would be as to what was said before and after the stabbing and set against it Ram's limited response. Accident was not possible on the facts; self-defence was equally difficult, without attempting to draw a fine distinction between what is excessive and what is not. The evidence was of a ferocious response to provocation. The excessive nature of the 'self-defence' plainly raised the inference that Mr Ram was provoked. I saw and had no difficulty in establishing the first part of the evidential burden of provocation, it was part of the prosecution case; I foresaw and there was every difficulty in establishing the 'reasonable man' element.
>
> All this was explained to Ram; as his response was so limited and he would be so vulnerable to cross-examination it was decided that he should not give evidence and that the defence should be provocation, the basis of which was to be proved by the prosecution witnesses. On this footing with Ram's consent we proceeded to trial. The question whether or not to give evidence was reconsidered at the trial; whether to gain the advantage of denying the threats etc, as against the vulnerability of Ram to cross-examination. The decision was adhered to."

After dealing with the handling of Mr Mozomil's evidence, he turned to Mr O'Connor's anxieties about the failure to advance defences of accident or self-defence. He said:

> "If the suggestion is that the three should have been run together in the hope that one might succeed I did not and do not regard it as practicable."

Of the judge's comment on self-defence, Mr Draycott said:

> "His reference to 'fanciful to a degree' was not

inappropriate; but whether it was or not it was his opinion which he thought it proper to give on the facts, not 'in the light of the lawyer's decision.'"

After these comments were obtained, Mr O'Connor reviewed the basis upon which an appeal against conviction might be advanced. In an Advice dated 29 September 1988 he said:

"I have reluctantly concluded that we cannot pursue the 'self-defence' question before the Court of Appeal for the following reasons:

(a) The balance of the independent evidence at trial; in particular, for example, Mark Trace confirming the 'I hope I killed him' expression; both Trace and Stenson described a mutual coming together to fight rather than attack by the deceased; the throwing of glasses from the defendants' table.

(b) The number of stab wounds and the omission of explanation to the police for more than one.

(c) The powerful psychological and legal reluctance the Court of Appeal has shown to allowing the re-opening of calculated decisions made by a defendant's legal representatives at a criminal trial. The fact that I or even the Court of Appeal judges might not have made the same decision, is nowhere near enough, see R v Gautam C. of A. Times 4.3.88. and R v Irwin [1987] 2 All ER. Here it was in my view a very finely balanced decision which cannot be described as incompetent or misguided."

He thus advised that the appeal should go ahead upon the basis that, had the evidence of Mr Mozomil been more fully available to the jury, the defence of provocation might have succeeded. So the appellant's application for leave to appeal proceeded and, as previously stated,

was dismissed.

In 1993 the Secretary of State was asked to refer the appellant's conviction to the court on the ground that it was unsafe or unsatisfactory. The Secretary of State declined to do so but his decision was challenged in the Divisional Court. Although Mr MacDonald QC was unable to persuade the court to quash the Secretary of State's decision, nevertheless his submissions caused the court to express its disquiet that a serious error by trial counsel may have resulted in the decision not to run the defence of self-defence and had subsequently affected the decision of counsel asked to advise on appeal. The court, giving a paraphrased summary of counsel's advice, thought:

> "Counsel's assertion that the applicant stabbed the victim five or six times and that it was a ferocious or frenzied attack was wrong. Further, that Mr O'Connor who when writing his first advice was well aware that there were two stab wounds could have been influenced by Mr Draycott's mistake and concluded that there were multiple stabbings, thus perpetuating the first error in the second advice on appeal."

So the Secretary of State was persuaded to review his earlier decision and referred the case to this court.

Underlying the grounds of appeal is the assertion that, when advising the appellant that a defence based on self-defence stood no reasonable prospect of success, Mr Draycott was under the mistaken impression that the wounds above the deceased's eye were caused by a knife. When in 1988 he was asked to give the reasons which a year earlier had weighed with him in advising the appellant he described them as being "caused by the knife". From these four words Mr

MacDonald argued that in reaching his decision to advise that the defence should be provocation and not self-defence Mr Draycott was seriously at fault. He had unjustifiably assumed they were caused by a knife and had failed to take into account evidence that they were caused by glass.

It would be too shallow an approach to the issues in this case to consider the suggested omission on its own for it implies that the causation of the wounds would have been the significant factor in rejecting self-defence as the explanation why the appellant killed the deceased. What caused the multiple injuries to the left side of the deceased's face was less important than who did so and in what circumstances; if the evidence showed that the deceased caused these injuries, whether by using a glass or a knife, in addition to the two stab wounds in the back, it strongly suggested that far from acting in reasonable self defence he retaliated in murderous fashion. No-one but the appellant was seen to fight the deceased; no-one else was seen with a potentially lethal knife. In the committal statements no witness saw the appellant hit the deceased with a glass, though when he gave evidence Mr Sultan Ahmed told the jury that the appellant hit the deceased on the face with a glass. On any detached appraisal of Mr Draycott's explanation for his advice it is clear that his assessment was based on many factors of which the number and nature of the deceased's injuries was but one. Most importantly he had to make his decision on the facts disclosed in the witness statements, the postmortem reports and the photographs. We must therefore review in greater detail the evidence confronting him when he had to decide what legal framework could best accommodate the appellant's version of events. Also, if he did fail to consider the cause of the cuts to

the left side of the deceased's face, we have to consider how far it vitiated his advice. Finally we must decide whether in any event on the basis of the evidence and of the evidence given before us the conviction of the appellant was unsafe or unsatisfactory.

1. What was the state of the evidence when Mr Draycott advised that self-defence stood no reasonable prospect of success?

In addition to the statements of witnesses whose evidence we have already related describing the confrontation between the appellant and the deceased, Mr Draycott had to consider statements made by the other members of the party to which the deceased belonged. Mr MacDonald suggested that such evidence should have been discounted by defence counsel as likely to be partial and antagonistic to the appellant. Counsel would indeed have failed in his duty if he had approached the evidence on any such basis. Nadine O'Neill did not hear what started the argument between the appellant and the deceased but something he said caused her to look round in the appellant's direction. She said:

> "The man was standing up and as he stood up his table was tipped up. He put his right hand into a right pocket and as he pulled his hand out I heard a click and he said: 'I'll kill you, you bastard'. I saw he was holding a knife in his right hand. Something glinted, it could have been the blade or the handle. We had all stood up when we saw the knife and our table had been knocked over. It had been knocked towards the wall and it was completely upside-down. Clarke had come round the table to stand by Jackie, his girlfriend.
>
> I saw the man with the knife bring the knife down from his head and at Clarke and then he brought it back up at him again. He went berserk. I didn't realise that the knife was going into

> Clarke. I shouted: 'You bastard'. Jackie was trying to pull Clarke out of the way and the other man's girlfriend was trying to stop him. It all happened so quickly."

Her husband, Eddie O'Neill, also in the party said:

> "I heard some bad language. I don't recall what it was or who said it. Clarke was up and the two Asians were up. Their table was turned over and some punches were thrown. I heard someone say: 'Put the knife away, there's no need for that', or words similar ... The next thing I know, Clarke is lying in the doorway with blood pumping out of him. I don't know what happened to Clarke, I didn't see anybody hit him ...."

Another of the party was Jacqueline Watson. Her attention was attracted when the deceased stood up and she noticed he was talking to someone behind her. She turned around and saw the appellant with what she thought was a table knife in his right hand, pointing it at the deceased. She said to him:

> "There's no need for that."

Then the deceased walked past her and the next thing she knew he was lying in a lot of blood on the floor.

Sharon Badger described the argument about the music and said:

> "All of a sudden I heard the table behind me overturn and Clarke jumped up out of his seat. The next thing I knew the Indian kid with the short hair was standing behind Jackie. Clarke walked around the end of the table towards him and when I looked again I saw that the Indian kid had a flick knife in his right hand. He said to

A

> Clarke: 'I'm gonna cut you up', and then he just went berserk.
>
> I didn't really see what happened because everyone was standing up and Nadine and Jackie were trying to pull them apart.

B

> The other Indian kid was standing behind me and I grabbed his arm because I thought he was going for Dave and I asked him to calm his mate down. I could see that Clarke had been stabbed above the eye, the left eye I think, and blood was pouring down his face. Clarke walked over to the door clutching his face and I followed him.

C

> The kid with the knife was going berserk, waving the knife about. Jackie and Nadine were both standing screaming. When Clarke got to the door he slumped against the wall and fell down onto the floor on his left side. It was then that I saw the blood pumping out of his left side."

D Later she said:

> "The kid with the knife was standing beside the waiters and he said to me: 'Is he dead? I said: 'No', and he said: 'Well he's fucking gonna be'. He was still going mad and waving the knife about. He walked to the door, still with the knife in his hand ..."

E

David Lea, the last member of the party, saw the deceased and one of the Asian youths on the table opposite stand up and start to shout at each other. He did not know what had caused it, it had happened so suddenly, but they were swearing at each other. The next thing he knew was that they both went for each other and started to fight in the centre passageway between the tables. He thought they were punching and throwing glasses at each other.

F

G

Doctor Norman Gower the Crown pathologist who carried out the postmortem examination described three jagged cuts: 25, 22 and 18 mm. long present above the left eye which entered superficial tissue only.

H

He also described a cut 22 mm. long on the left side of the neck and 22 mm. below the ear which showed some undercutting of its lateral edge with damage extending 10 mm. into the superficial tissues. The wounds are vividly shown in the separate photograph no. 2513 and, after they had been cleaned, in photographs 3, 5 and 7 of the series 2514.

A second postmortem carried out by Doctor Acland, a pathologist instructed in behalf of the appellant, confirmed the nature and position of the two deeply penetrating stab wounds in the deceased's back. He also described the three jagged cuts above the left eye and a further cut to the left side of the neck, describing them as "superficial" and in his opinion probably associated with broken glass. Having seen the photographs of the wounds, we think Doctor Acland can only have been using the word "superficial" in the same sense as Doctor Gower -- that the wounds did not penetrate beyond the superficial tissue. After agreeing that the cause of death was due to the penetrating wound in the back of the chest, he expressed the opinion that only the two deep penetrating wounds were caused by a knife. He said:

> "All of the others were almost certainly caused by broken glass and I understand that a broken bottle or glass was involved in the incident."

Finally he added:

> "The interpretation of the delivery of the two stab wounds depends upon the circumstances of the altercation but the question of the wounds predominantly on the back of the chest make it difficult to explain that they were caused by self-defence, especially as they number more than

> one. However if you have more detailed information on the actual mechanics of the fight I will be pleased to assist further."

Doctor Acland was called to give evidence before us with a view to showing that, had he been asked to assist further, he could have expressed an opinion how the stab wounds in the back could have been caused when the appellant was facing the deceased. To account for them he was asked to consider a hypothetical situation and possible movements of the knife for which there was no support in the evidence but which as a matter of theory might have explained two stab wounds in the back. For example, he said such wounds might have been caused in the course of a struggle if the assailant, facing the deceased, had used a "swinging" movement of the right arm. But he repeated that it was difficult to explain the injuries by self-defence.

To refute his opinion the Crown had sought the advice of Doctor Whitwell who, on examining the photographs, Doctor Gower's diagram and a drawing of the deceased's jumper, was of opinion that there were three stab wounds in the back and not just two. Doctor Acland agreed that there were three such wounds and that the third may well have been caused by a knife. He said:

> "A flick knife could have caused this wound."

In her evidence Doctor Whitwell described the third injury to the back as having the appearance of a knife wound. Taking into account the number and position of the wounds, she thought it was unlikely that they were inflicted in self-defence but not impossible.

In our opinion the effect of this evidence was to demonstrate what every experienced counsel knows, that in reconstructing events from postmortem appearances there are considerable limitations to the opinion of an expert, however distinguished.

The facts with which Mr Draycott thus had to deal were:

(i) That the deceased had sustained two deeply penetrating wounds to the back inflicted by a sharp knife.

(ii) Many witnesses described the appellant as being armed with a knife; some described it as a flick knife; Mrs Schneider who was close to the appellant gave a detailed description of it.

(iii) The fight between the appellant the deceased was started by the deceased's stupid racial remark about the music. But the weight of the evidence strongly suggested that they then confronted and fought with each other.

(iv) Apart from a suggestion of one witness that the appellant's friend Shinji had joined in the fight, there was no evidence that anyone other than the appellant had fought with the deceased or had struck him.

(v) The deceased, in addition to the two stab wounds, had sustained a number of ugly looking wounds to the

superficial tissues on the left side of his face.

(vi) Sharon Badger said that the deceased had been stabbed above the left eye and that the appellant had gone berserk. Nadine O'Neill had seen the appellant bring the knife down from his head at the deceased.

(vii) Apart from a suggestion that a wine glass had hit the deceased on the head and that other glasses had been thrown which could have hit the deceased, there was no other explanation for the three jagged wounds over the eye and the wounds in the neck. There was no evidence, as Doctor Acland had thought, that a broken bottle had been used on the deceased.

(viii) There was evidence that the appellant at the time he was fighting the deceased and after the deceased was lying on the floor fatally injured had expressed his hope that the deceased would die.

(ix) That the wound sustained by the appellant was minor compared with those sustained by the deceased, suggesting he gave a good deal better than he got.

(x) That the account given by the appellant in interview with the police was obviously untrue; his description of taking a closed penknife with a small blade from

his pocket as the deceased came towards him and being able to open the blade so that the deceased became accidentally stabbed was most unlikely to be accepted by any jury. Further the blade he described was not long enough to have caused the fatal injury.

When in 1988 Mr Draycott gave his reasons for having advised the appellant that a defence of self-defence stood no reasonable prospect of success, he did not mention Doctor Acland's opinion. Nevertheless there is a clear indication that when he cross-examined Doctor Gower at the trial Mr Draycott had clearly in mind Doctor Acland's opinion as to how the wounds to the back and above the eye could have been caused. The judge in his summing-up drew attention to part of the evidence of Doctor Gower. He said:

> "It is right to remind you that Doctor Gower was prepared to acknowledge that there was at least a possibility that if at the material time the deceased man had been standing sideways on then the wound could have been inflicted by an assailant with the deceased in that relationship too, certainly not face to face .... The deceased also had three jagged cuts over the left eye shown in the first page of your diagram. Is that caused by glass being thrown or pushed at him and if so by whom?"

It would thus appear that Mr Draycott had sought to establish the effect of Doctor Acland's opinion through the mouth of Doctor Gower in the course of the trial.

In summary, at the time when Mr Draycott gave his advice to the appellant that self-defence stood no reasonable prospect of success, there was evidence from eye witnesses that the appellant had

used a flick knife in fighting with the deceased in a way which could have caused the wounds above the eye and to the neck. There was no clear evidence to explain how such extensive wounds could have been caused by broken glass and, on the contrary, the only weapon seen in the hand of the appellant was the flick knife. The appellant denied that he had used a glass and, apart from one witness who said that Shinji joined in, no-one else was seen to strike the deceased. There was evidence that the appellant was aggressive and was waving the knife about. On the other hand there was the opinion expressed by Doctor Acland which Mr Draycott almost certainly had in mind at the trial when he cross-examined Doctor Gower.

These factors convince us the suggestion that Mr Draycott based his advice on a mistaken view of the cause of the three cuts above the deceased's left eye is unsustainable. It certainly cannot be said that there was no evidence to support the statement made a year later that they were caused by the knife but counsel when making that statement clearly did not recollect his cross-examination of Doctor Gower, and Doctor Acland's opinion. What is clear to us is that counsel made a much deeper appraisal of the implications of the evidence likely to be given and concluded that self-defence could not be argued. In his decision the picture of the multiple and widespread injuries, unexplained by the appellant's account, no doubt played a greater role than the precise way in which the wounds over the eye and to the neck were occasioned.

2. If Mr Draycott overlooked Doctor Acland's opinion, did this vitiate the advice which he gave?

Whilst for the reasons given we think it most unlikely, we must consider the possibility that Mr Draycott either overlooked or unduly discounted Doctor Acland's opinion. But even assuming he did so, what prospect did the appellant have of persuading the jury that the Crown would be unable to show that he had not acted in reasonable self-defence? Mr MacDonald conceded that accident was out of the question. He also accepted that counsel had to choose between self-defence and provocation, as in the circumstances of this case the two defences were not compatible.

Counsel advising the appellant could reasonably hope that the jury would take the view that the deceased was the aggressor and had begun the fight by lunging at him with a glass which broke and cut his cheek. The incident had begun quickly but the account given by the appellant in interview suggestive, as Mr Draycott said, of accident or self-defence, was irreconcilable with the stab wounds which killed the deceased. The evidence of the weapon used by the appellant and the stab wounds in the back were quite inconsistent with self-defence as was the evidence of his aggressive behaviour and words. Equally inconsistent was the evidence that after the deceased's initial lunge, the appellant stood up, fought with the deceased, then unarmed, and produced a flick knife in the course of the fight. It was a powerful inference that the stab wounds in the back had been inflicted at best when the deceased was turning away from the appellant and at worst when he had his back to him. Any objective assessment of the appellant's account, when he attended the police station a week later with his solicitor, would have concluded that there was no reasonable

prospect of the jury accepting that the Crown had not ruled out self-defence. The judge's assessment was that in the circumstances it would be fanciful. Mr MacDonald said that the judge was led to this conclusion because the defence were arguing provocation and had not put forward self-defence. But whether Mr Draycott had argued self-defence or not, the judge would not have passed such a comment if he thought that there was a real prospect of the jury concluding that the Crown had failed to disprove it.

We note also that Mr O'Connor, having received Mr Draycott's explanation, considered that the question of self-defence could not be pursued before the Court of Appeal because the balance of independent evidence at the trial confirmed a mutual coming together to fight and because of the number of stab wounds and the omission of explanation to the police for more than one wound.

The appellant has failed to persuade us that he was deprived of a viable ground of defence by the advice of his Leading Counsel. It is easy, as Lucretius observed, to stand on the safety of the shore and pass judgment on the work of those battling against the wind and waves in a high sea. It is perhaps even easier six-and-a-half years later.

3. <u>Has it been shown that a conviction of the appellant was unsafe and unsatisfactory?</u>

The evidence we heard did not persuade us that if the defence of self-defence had been advanced and if the jury had heard the evidence of Doctor Acland they might have reached a different conclusion. The hypothesis put forward by Doctor Acland to explain the two stab wounds in the back which had originally seemed to him

difficult to explain as being caused during self-defence, was unconvincing and incompatible with the horizontal track of the fatal wound. We note that, even with the favourable mistake made by the judge in his charge to the jury that one of the stab wounds was to the deceased's front, the jury rejected the suggestion of self-defence.

Mr MacDonald also invited us to have regard to the ground of appeal rejected by this court on the earlier occasion that Mr Mozomil's evidence would, with the aid of an interpreter, have made a significant difference to the different defence argued in this appeal. It is an odd feature of the case that Mr Mozomil's statement taken by Detective Constable Conn appears couched in fluent English, whereas when he came to give evidence he could only be understood with difficulty. But even taking his statement at face value, his evidence in so far as it added to the evidence already described was not helpful to self-defence. Not only did he describe the appellant and the deceased as standing up and swearing and shouting at each other, he described how, after the appellant had been hit with the glass, the two men began to fight, punching each other. He described both the appellant and the deceased as holding table knives when no other witness at all spoke of the deceased holding a knife. When Mr Mozomil was tendered as a witness by the Crown at the trial, Mr Draycott sought to establish who had started the fight. Mr Mozomil said:

> "Started fight white man .... He do it by glass .... His hand one glass throw in his face."

Asked what happened then, he said:

> "Then this Asian man stand, you know, in that

> table, just like that and he just like, you know, get his, I don't know, I see some table knife you know."

He then demonstrated how the appellant had stabbed with his clenched fist. Later he said that glasses were being thrown and one or two plates.

From these answers Mr Mozomil was clearly mistaken in thinking that the knife used by the appellant was a table knife. Further, it is clear that he had seen comparatively little of what had occurred.

We were also referred to a short transcript of evidence given by Mr Sultan Ahmed, the manager of the Blue Sky Restaurant. His account confirmed that this incident started by a rude remark about the music and an argument developing as a result. But he said that both sides were making racist remarks and then the deceased hit the appellant with a glass. Asked what happened next, he said:

> "Then Sati (the appellant) hit him back with a glass as well on the face."

This the appellant had denied in interview. Mr Ahmed certainly gave no picture of the appellant in a situation struggling to save himself and acting reasonably in self-defence. As earlier stated, Mr Draycott did not know of this evidence when advising the appellant because it was not in Mr Sultan Ahmed's committal statement. But even if he had, it would not have helped the credibility of self-defence. Rather it tends to confirm that Mr Draycott was wiser to base his advice on an overall view than on an opinion that the three cuts above the deceased's eye were caused by glass.

Mr MacDonald, in addition, urged us to say that the appellant's conviction was unsafe and unsatisfactory because his trial was unfair. He had been prevented from giving evidence in his own defence by advice which deprived him of the opportunity of putting his side before the jury in his own words. Mr MacDonald placed before the court the draft of an affidavit from the appellant and we agreed to take it into account as if it were evidence given before the court by him. In this draft the appellant refers to visits made to him by Mr Langford when he was on remand in Shrewsbury Prison and he recalled a discussion in which he had told Mr Langford several times that he had been acting in self-defence. Although Mr Langford mentioned manslaughter, nothing was said about provocation. He referred to the visit of Mr Draycott and said:

> "Mr Draycott informed me that we could not put forward a defence of self-defence because of the number of injuries caused by the knife. He stated that the only defence available to me was one of provocation. He said there was clear evidence of provocation and that I had a very strong case on this. He did not explain the defence of provocation in detail. He did explain that the defence would only reduce the charge to manslaughter. I again repeated that I had acted in self-defence. Mr Draycott stated that self-defence was not an option open to me."

Later he said:

> "I decided to allow Mr Draycott to conduct my defence as he suggested. I believed I did not have any other option but to accept his advice."

He also describes how he was visited in the cells at the Crown Court at Birmingham and told by Mr Draycott and his junior

counsel, Mr Linehan, in the presence of Mr Langford, that they had reached the decision that he should not go into the witness box because they felt he would be vulnerable to cross-examination. After further discussion, he again accepted the barrister's advice and allowed them to conduct his defence as they suggested.

It is clear that the appellant agreed, albeit reluctantly, that his defence should be provocation and accepted the advice that he should not give evidence. We have no doubt that he was wise to accept the advice he had been given. The decision to advise the appellant not to give evidence would not have been taken lightly. Just as it is counsel's duty to point out to a client reluctant to give evidence how his defence could be disadvantaged, so where cross-examination would be likely to expose grave weaknesses in his evidence thereby undermining the defence it is his duty to bring home to him the risks of doing so. In the circumstances of this case we think no counsel of experience would have given him any other advice. He was indeed in a very vulnerable position if he sought in evidence to support the account he had given in interview. Counsel does not act in dereliction of duty who honestly advises on the basis of his experience and judgment that by giving evidence the defendant would give the Crown the opportunity of exposing the fragility and emphasising the inconsistency of his account of events. The more so when the defendant can provide no reasonable explanation for incontrovertible facts probative of guilt; in a word when any advantage to his case in his giving evidence is far outweighed by the risk that the case against him will be strengthened.

There seems to be an increasing tendency to believe that it is only necessary to assert the fault of trial counsel to sustain an

argument that the conviction is unsafe or unsatisfactory. Whether this is due to a mistaken interpretation of the observations on this subject by the Royal Commission on Criminal Justice we do not know; but we do see far reaching implications in the Commission's suggestion (Ch. 9, Para. 59) that even a reasonable decision of counsel could be the cause of a miscarriage of justice. Like the Commission, the court could not countenance a case in which the defendant is serving a prison sentence for no other reason than a mistake on counsel's part, but equally where counsel's judgment has been reasonable there is a strong public interest that the legal process should not be indefinitely prolonged on the ground, for example, that a defendant's case advanced within a different legal framework might have stood a greater chance of success. The advantages claimed for the adversarial system of justice of necessity depend greatly on the skill and judgment of trial counsel.

We come to Mr Macdonald's last submission which was that the court in deciding the appeal and in concluding that the appellant would have stood a real chance of acquittal had he advanced the defence of self-defence should take "judicial notice" that at the time of the appellant's conviction in 1987 there were in this part of Birmingham numerous racially motivated attacks perpetrated on the Asian population. He urged us to consider that in the confused situation which followed the initial racist remark the appellant could have believed that he might be the subject of such an attack and so have over-reacted. But nowhere in the appellant's account does he say that he believed this; and the evidence went no way to support such an extreme interpretation of the events. Judges are well aware that from time to time racial differences lead to violence and are quick

to condemn such violence; yet there is no suggestion in the summing-up of any such background in this case. The witnesses were almost at one in describing an incident which began with an isolated racial remark by the deceased to which the appellant responded stupidly. They were both much the worse for drink and were looking for trouble. There was no evidence from which the court could say that there was a concerted attack by others on the appellant. We fear that in this submission Mr MacDonald allowed analysis of the evidence to yield to speculative supposition.

In summary we are not satisfied that there is any reason to suppose that this appellant was deprived of a viable defence by the failure of trial counsel to advise him properly in accordance with the evidence available to him; we are not satisfied that his conviction was unsafe or unsatisfactory or that the further evidence we heard would have made any significant difference to the advice of counsel or to the verdict of the jury and accordingly the appeal is dismissed.